

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 03/06/06; Decision Issued: 03/08/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8287; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8287

Hearing Date:	March 6, 2006
Decision Issued:	March 8, 2006

PROCEDURAL ISSUES

Grievant requested as part of his relief that he receive attorney fees. Grievant was represented during the hearing by a coworker who is not an attorney. A hearing officer does not have authority to order payment of attorney fees unless grievant is represented during the hearing by an attorney admitted to the Virginia State Bar for practice in the Commonwealth of Virginia.

Grievant had been assigned as a safety and security technician for which he received a 15 percent pay differential. Following the October 17, 2005 incident for which he was disciplined, grievant was removed from this assignment during the investigation and reassigned to duties that did not involve patient contact. He mentioned this reassignment in his grievance, which was filed on January 10, 2006. Because grievant did not initiate his grievance within 30 days of the reassignment, the reassignment is not grievable.¹ The parties have not agreed in writing to extend the 30-day requirement.

¹ § 2.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Employee Relations Manager
Advocate for Agency
Two witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice for physically abusing a patient.² As part of the disciplinary action, grievant was removed from state employment effective January 9, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.³ The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for one and a half years. He was a direct care associate working as a safety and security technician at the time of removal from employment.⁴

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has **zero tolerance** for acts of abuse or neglect."⁵ The policy requires all employees (including contract employees) to *immediately* report allegations of abuse or neglect of residents to the facility director.

² Agency Exhibit 1. Group III Written Notice, issued January 9, 2006.

³ Agency Exhibit 1. *Grievance Form A*, filed January 10, 2006.

⁴ Agency Exhibit 6. Grievant's Employee Work Profile, August 12, 2004.

⁵ Agency Exhibit 8. Section 201-3, Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, October 31, 2003. The definition of abuse is: "Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse."

Grievant received training in approved restraint techniques and management of aggressive behavior.⁶ The current training program is known as Therapeutic Options of Virginia (TOVA). The protocol for dealing with aggressive patients is to first attempt to redirect the patient verbally. If that is not successful, the employee should call on his radio for assistance from other employees. If the patient becomes physically aggressive, the approved technique involves moving backward and assuming a defensive posture. If physical contact becomes unavoidable, the employee should attempt to grab the patient in a bear hug and, if necessary, take him to the floor. Any physical restraints used on patients should minimize the risk of injury to either the patient or the employee.

The facility at which grievant works houses criminal offenders who are either suffering from psychiatric problems or have been adjudged not guilty by reason of insanity. On October 17, 2005, a patient who is apparently delusional was acting disruptive and unruly.⁷ While on the ward, the patient had been verbally confrontational with employees. During this time, for no apparent reason, he challenged grievant to fight but was redirected by nursing staff.⁸ Subsequently, patient B became verbally aggressive toward two other patients. At about this time, staff was organizing patients to go to the dining room.

A digital video recording of the hall outside the ward reflects that patient B walked into the hall with another staff person.⁹ Grievant, carrying his helmet in his hand, followed patient B into the hall. The patient appeared to be agitated and walked back and forth swinging his arms. He reversed his direction and walked back toward grievant in an apparently confrontational manner. When he got close to grievant, two other staff employees redirected him to turn around and go back down the hall toward the dining room. Patient B started to comply with this instruction but then turned around again and walked up to grievant. Grievant stepped forward one step so that he and patient B were chest to chest. There was a scuffle in which grievant and patient B grappled with each other briefly and then grievant picked up patient B in a body slam move¹⁰ and took him down to the concrete floor. This body slam is clearly shown on the recording and is

⁶ Agency Exhibit 5. Competency Validation Tool, June 10, 2004.

⁷ Agency Exhibit 3. Patient B's written statement, October 20, 2005, in which the patient asserts that he was hearing female voices putting him down and telling him to get into a fight.

⁸ Grievant Exhibit 7. Written statement of witness, October 17, 2005.

⁹ The recording is not continuous but rather appears to be taken at brief intervals (perhaps 2-4 frames per second). The image is less than perfect because of the distance from the camera and the camera not being perfectly focused. Despite the recording's shortcomings, the hearing officer reviewed it several times both during and after the hearing. After careful examination of the recording, the hearing officer found the facts as stated above.

¹⁰ Grievant put one arm over the patient's shoulder and the other arm between the patient's legs, lifted him chest high and took him to the floor.

corroborated in several witness statements. Multiple witnesses assert that they heard the patient's head hit the concrete floor.¹¹

Although the video recording does not have an audio track, one witness states that grievant told patient B to get out of his face and the patient then hit grievant on the shoulder. Grievant then "went off" and body slammed the patient to the floor.¹²

The patient is in his 30s, 5'9" tall, and weighs 141 pounds. Grievant is 32 years old, 6'2" tall, and weighs 290 pounds. Medical examination of the patient following this incident indicated no head injury but the patient did bite his lip. He complained of knee pain but records reflect that the patient had sustained a knee injury two weeks prior to this incident.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the

¹¹ Agency Exhibit 3, pp. 1 & 8. Written witness statements, October 19, 2005.

¹² Agency Exhibit 3, p. 17. Written witness statement, October 19, 2005.

circumstances. In all other actions the grievant must present his evidence first and prove his claim by a preponderance of the evidence.¹³

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁴ It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.¹⁵

The agency has proven by a preponderance of evidence that grievant picked up a patient and body slammed him onto a concrete floor. This action was witnessed by several people who attested to it in their written statements. A video recording clearly shows grievant using the body slam movement. Finally, grievant acknowledges that he used this movement in an effort to control the patient. Grievant further acknowledges that a body slam is not an approved maneuver for patient control, and that he should be disciplined. However, grievant feels that removal from employment was too harsh and that the discipline should be reduced.

Grievant avers that patient B struck him before he picked the patient up and body slammed him. At the point when this occurred, grievant's back is to the camera and because patient B is shorter, this cannot be seen on the video recording. However, another patient corroborated grievant's statement and therefore it is presumed that patient B did strike grievant.

Grievant argued that using a body slam was his only option to control the patient. However, grievant's witness, the captain in charge of security, testified that he could not envision any situation where a body slam would be the appropriate type of response. Moreover, the evidence reflects that grievant did not use either verbal redirection or call for assistance before physically confronting the patient. Further, when the patient struck grievant on the shoulder, grievant did not back away and assume a defensive stance as the TOVA training calls for. Finally, when patient B came up to grievant, rather than stepping back, grievant stepped *forward* and went chest-to-chest with the patient.

¹³ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹⁴ Agency Exhibit 9. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹⁵ Agency Exhibit 8. Section 201-8, DI 201(RTS)00, *Ibid*.

This form of confrontation was a none-too-subtle challenge to patient B letting him know that if the patient wanted to start something, grievant was ready to finish it. Grievant's actions were contrary to the intent of TOVA training. Moreover, body slamming a person onto a concrete floor carries a great risk of injury. While it is fortunate that the patient did not sustain any serious injury (other than a cut lip), the potential for a head injury was significant in this case.

Grievant asserts as part of his defense that other employees earlier failed to redirect patient B by offering him "time out" (isolation) and that this made the patient more aggressive and angry. Assuming this to be true, grievant did not file any written report about this assertion. Moreover, what occurred prior to the hallway encounter has no direct bearing on how grievant reacted to and handled patient B once the physical altercation occurred.

Grievant offered testimony that others have been involved in physical encounters with patients but have not been removed from employment. The agency acknowledged that in the past there have been several physical encounters between staff and patients. Each incident was investigated and evaluated based upon individual circumstances; some employees were removed from employment and some were disciplined but not removed. Each case was handled based on its own merits. Grievant did not offer any specific evidence of a case that was sufficiently similar to his case to merit comparison of disciplinary actions.

Although grievant suggested that this patient had a propensity for physical aggressiveness, the evidence revealed only one prior incident, when the patient injured himself on October 3, 2005. One incident does not constitute a propensity. Moreover, even if grievant had been able to demonstrate a repeated history of aggressive behavior, the fact remains that grievant is responsible to respond to such aggressiveness according to the training he has received from the agency.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for only one and a half years and therefore, does not have long state service. His performance prior to this incident has been satisfactory. The agency did not consider this latter factor to be sufficiently mitigating and decided that the appropriate corrective action was removal from state employment. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on January 9, 2006 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁶ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁷

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁶ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.